

# MISSION CRITICAL

## TERMS & CONDITIONS

**1. APPLICABILITY/SCOPE:** These terms and conditions are incorporated by reference into any proposal, order or other writing for the provision of goods and/or services ("Goods") by RK Mission Critical, LLC ("RKMC") to the buyer of such Goods ("Buyer"). By executing such proposal, order or other writing and/or by accepting such Goods, hereby agrees that all Goods provided by RKMC shall be governed by the terms and conditions set forth herein and that such items and conditions together with such proposal, order or other writing constitute a contract between RKMC and Buyer. Any modifications to these terms or to the scope at any order or project hereunder shall not be effective unless mutually agreed upon and set forth in an appropriate writing executed by both parties. Such writing shall clearly set forth the nature and extent of the change, and, if applicable, any adjustment in price associated with such change. These terms and conditions supersede all previous sales and credit, payment terms and conditions, and finance policies issued by and all previous oral or written agreements, proposals and negotiations between RKMC and Buyer with respect to the Goods, and shall remain in effect until further notice. These terms and conditions will govern additional orders for Goods of the kind described herein, whether such additional orders are at the same or a different price.

**2. PRICING /PAYMENT:** The price to be paid by Buyer shall be mutually agreed upon by the parties in writing. Unless otherwise agreed to, such price will not include any state, local or federal taxes, sales, use, excise, privilege, other local taxes, duties or custom fees, freight and handling charges, or export crating costs, and Buyer shall pay RKMC the amount of all such taxes that RKMC may be required to pay in connection with Buyer's order. All prices are subject to change without notice. The pricing for any Goods provided on a time and materials basis will include labor at an hourly rate that includes profit, overhead, general and administrative expenses as set out in the current RKMC's Standard Labor Rates Chart. T&M will also include materials and third-party services at trade prices. Buyer will have no right to access RKMC's cost or pricing data or other books and records. Unless otherwise agreed to, payment is due and payable in US dollars net on receipt of invoice without discount. Unless payments by Wire or ACH are authorized in writing by RKMC, all payments shall be remitted by check as RK Mission Critical, LLC, 3800 Xanthia Street, Denver, CO 80238. RKMC reserves the right to specify the method and/or timing of payment (including prior to shipment) if RKMC, in good faith, believes that the prospect of payment by Buyer has been impaired. If Buyer is or becomes insolvent, is unable to pay its debts as they mature or files or has filed against it a bankruptcy, insolvency or similar petition, or if RKMC in good faith doubts the ability or willingness of Buyer to pay, then RKMC may demand cash payment in advance before shipments are made. A FINANCE CHARGE OF LESSER OF ONE AND ONE-HALF PERCENT (1½%) PER MONTH (EQUIVALENT TO AN ANNUAL PERCENTAGE RATE OF EIGHTEEN PERCENT (18%)) OR THE HIGHEST RATE ALLOWABLE BY LAW, CALCULATED DAILY AND COMPOUNDED MONTHLY, WILL BE ADDED TO THE UNPAID BALANCE OF ANY INVOICE DATE UNTIL SUCH AMOUNTS ARE PAID IN FULL. Buyer will reimburse RKMC for costs, including reasonable attorney fees, incurred by RKMC in connection with the collection of any past-due amounts from Buyer.

**3. DELIVERY/PERFORMANCE:** Unless specified in writing, in the shipping instructions, any Goods, are to be shipped by whatever shipping method RKMC deems appropriate. Buyer assumes all risk from and after delivery to carrier, including all responsibility for shortage, loss, delay or damage in transit. All schedule performance and delivery dates are approximate and, unless otherwise agreed to by RKMC in writing, RKMC shall not be liable for loss, damage, or delay resulting from causes beyond its reasonable control or caused by civil insurrection, war, fires, strikes or other labor disturbances, Acts of God, shortages of materials or failure of supplies or subcontractors to satisfactorily meet scheduled deliveries, delay or failure by Buyer to perform its obligations under these terms and conditions, or any other factor or event beyond RKMC's reasonable control. Acceptance by Buyer of any Goods when received waives any claim resulting from a delay. UNDER NO CIRCUMSTANCES WILL RKMC BE RESPONSIBLE FOR OR BUYER BE ENTITLED TO DIRECT, INDIRECT OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR OWING TO ANY DELAYS IN DELIVERY OR PERFORMANCE WHATSOEVER. In the event RKMC's performance is delayed or interrupted at the jobsite by Buyer or others, the resulting downtime of RKMC's employees shall be paid by Buyer at RKMC's normal billing rates, regardless of any other pricing terms of this contract with regard to any other aspect of this job. If shipment is delayed by Buyer, Buyer shall pay any costs incurred by RKMC for handling, storage and timely processing of Buyer's order as well as demurrage and similar charges, if any. Once RKMC has confirmed acceptance of an order from Buyer, unless otherwise mutually agreed upon in writing: (a) all Goods to be supplied hereunder and delivered within the United States shall be shipped F.O.B. factory; (b) all Goods to be supplied hereunder and delivered outside the United States shall be shipped Ex-Works (INCOTERMS 2010) at RKMC's plant of origin; and (c) title and risk of loss shall pass to Buyer upon RKMC's delivery of the Goods to the carrier. RKMC shall not be bound by any delivery requirements unless and until mutually agreed upon by the parties in writing, and Buyer will be responsible for the cost of any special packaging or special handling caused by Buyer's requirements. RKMC reserves the right to make partial shipments when necessary and payment shall be due for quantities actually shipped.

**4. INSPECTION/ACCEPTANCE:** (a) Buyer shall inspect all shipments of Goods upon receipt. Claims for damage, shortage or errors in shipping must be reported within two (2) days following delivery to Buyer. Buyer shall notify RKMC within ten (10) days of receipt of any defects or non-conforming goods which are not due to damage shortage or errors in shipping. The parties acknowledge that acceptance of any Goods supplied hereunder shall be deemed to have occurred if Buyer fails to notify RKMC in writing of any such defects or non-conforming Goods within ten (10) days of the date of receipt. The parties acknowledge that acceptance of any services provided hereunder shall be deemed to have occurred if Buyer fails to notify RKMC in writing of any defects or non-conformance in such services within ten (10) days of the date the services were completed; (b) for any order hereunder, which requires RKMC's involvement in the installation, start-up, check-out and/or commissioning of Goods or systems, the parties acknowledge that acceptance shall be deemed to have occurred upon completion of the start-up and check-out of the system or upon operational use of the system by Buyer, whichever occurs first. Buyer's acceptance or use of the Goods shall constitute Buyer's waiver of any claims for losses or damages of any kind regardless of the cause.

**5. LIMITED WARRANTY:**

Equipment: For equipment, accessories and other parts and components manufactured by RKMC.

RKMC warrants that at the time of shipment or delivery and for a period of one (1) year from the date of shipment or delivery to the original user, whichever is earlier, that any RKMC equipment supplied hereunder shall be free of defects in material design and workmanship. If (a) RKMC's goods prove to be defective in workmanship and/or material under normal and proper usage, and (b) Buyer's claim is made in writing within the warranty period set forth above, such goods will be repaired or replaced, at RKMC's option, without charge to Buyer. Repair or replacement, at RKMC's option, shall be Buyer's sole and exclusive remedy. In no event shall RKMC's warranty obligations with respect to equipment exceed 100% of the total cost of the equipment supplied hereunder. Equipment, accessories and other parts and components not manufactured by RKMC are warranted only to the extent of and by the original manufacturer's standard warranty to RKMC; in no event shall such other manufacturer's warranty create any more extensive warranty obligations on RKMC than the warranty covering equipment and parts manufactured by RKMC.

Services: Any services RKMC provides hereunder, whether directly or through subcontractors, shall be performed in accordance with the standard of care with which such services are normally provided in the industry. If the services fail to meet the applicable industry standard, RKMC will, for a period of ninety (90) days from the date of performance, re-perform such services at no cost to Buyer. Re-performance of services shall be Buyer's sole and exclusive remedy, and in no event shall RKMC warranty obligations with respect to services exceed 100% of the total cost of services provided hereunder.

Waiver: Any claims by Buyer alleging a defect in the goods and/or services provided hereunder shall be deemed waived unless such claim is made in writing within the applicable warranty periods set forth above and in accordance with the procedures set forth below.

Exclusions: RKMC'S WARRANTY AND THE REMEDIES CONTAINED HEREIN ARE EXCLUSIVE AND EXCLUDE AND ARE IN LIEU OF ALL OTHER WARRANTIES, ORAL OR EXPRESSED OR IMPLIED, INCLUDING ANY WARRANTIES THAT EXTEND BEYOND THE DESCRIPTION OF THE EQUIPMENT OR THE PARTS OR THE SERVICES. RKMC DISCLAIMS ANY AND ALL WARRANTIES OTHER THAN THOSE STATED ABOVE. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, SUITABILITY, DURABILITY, OR ANY OTHER WARRANTIES ARISING FROM THE COURSE OF DEALING, USAGE OF TRADE OR ADVERTISING.

RKMC's warranty is solely as stated above and does not apply or extend, for example, to consumable items, ordinary wear and tear, altered units, units repaired by persons not expressly approved by RKMC, materials not obtained from RKMC or damage caused by accident, the elements, abuse, misuse or overloading or by jobsite conditions.

In no event shall RKMC have any liability whatsoever for any failure, loss, damage or destruction of Goods which is due to the condition or state of the Goods, known or unknown, as it existed prior to the commencement of RKMC's work. In no event shall RKMC have any responsibility for, and RKMC's warranty shall be void for, any damage to the goods or failure of the services supplied hereunder, to the extent caused by Buyer's neglect, failure to follow RKMC's or the manufacturer's operational and maintenance procedures for the Goods, failure to maintain proper water chemistry for any Goods or parts that use water, or the use of technicians not specifically authorized by RKMC to maintain or service the Goods.

Procedures: Claim of any breach of any warranty must be made by written notice to RKMC's home office within ten (10) days of the discovery of any defect. RKMC agrees at its option to repair or replace, BUT NOT INSTALL, F.O.B. RKMC's factory, any part or parts of the equipment or any spare or replacement part which within the period stated above shall be proven to RKMC's satisfaction (including return to RKMC's plant, transportation prepaid, for inspection, if required by RKMC) to be defective within the above warranty. RKMC's warranty obligations hereunder do not include any removal, disassembly, inspection, retrofit or reinstallation costs incident to such repair or replacement. Expenses incurred thereafter by Buyer or user in replacing or repair or returning the Goods or any part or parts will not be paid or reimbursed by RKMC. RKMC agrees to repair or replace at its option, any Services that are proved to RKMC's satisfaction to be defective within the period and warranty stated above.

**6. CONSEQUENTIAL DAMAGES/LIMITATION OF LIABILITY:** IN NO EVENT SHALL RKMC BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, OR PUNITIVE DAMAGES, LOST PROFITS OR REVENUES OR DIMINUTION IN VALUE, ARISING OUT OF OR RELATING TO ANY BREACH OF THESE TERMS, WHETHER OR NOT THE POSSIBILITY OF SUCH DAMAGES HAVE BEEN DISCLOSED IN ADVANCE BY BUYER OR COULD HAVE BEEN REASONABLY FORESEEN. REGARDLESS OF THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT OR OTHERWISE) UPON WHICH THE CLAIM IS BASED, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE. IN NO EVENT SHALL RKMC'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THESE TERMS, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHER, EXCEED THE TOTAL OF THE AMOUNTS PAID TO RKMC FOR THE EQUIPMENT SOLD UNDER THE APPLICABLE ORDER. RKMC SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR EXPENSE DIRECTLY OR INDIRECTLY ARISING FROM THE USE OF THE EQUIPMENT OR ANY SPARE OR REPLACEMENT PART OR ANY SERVICES OR FROM ANY OTHER CAUSE WHETHER BASED ON WARRANTY (EXPRESSED OR IMPLIED) OR TORT OR CONTRACT, AND REGARDLESS OF ANY ADVICE OR RECOMMENDATIONS THAT MAY HAVE BEEN RENDERED CONCERNING THE PURCHASE, INSTALLATION OR USE OF THE EQUIPMENT OR ANY SPARE OR REPLACEMENT PART OF ANY SERVICES.

**7. OPERATIONAL AND MAINTENANCE PROCEDURES:** Buyer acknowledges that any improper use, maintenance, or modification of the Goods provided hereunder, or use of unqualified maintenance or service technicians will severely impair the operational effectiveness of the Goods and the entire system. Buyer hereby agrees to indemnify, defend and hold RKMC harmless from and against any and all third-party claims arising, in any manner, out of (a) Buyer's neglect of the equipment; (b) Buyer's use of technicians not authorized by RKMC to service the equipment; or (c) Buyer's improper use or modification of the equipment or failure to follow the operational and maintenance procedures for the equipment.

**8. SERVICE OR MAINTENANCE AGREEMENTS:** If Buyer purchases maintenance, service, or parts coverage under maintenance agreement with RKMC or its affiliates, the terms and conditions of that agreement shall contain the sole and exclusive warranty remedy of Buyer. In the event of any conflict between these Terms and Conditions and any enhanced RKMC service or maintenance agreement,

these Terms and Conditions shall govern with respect to service or maintenance on the covered equipment.

**9. CUSTOM EQUIPMENT OR SYSTEMS:** Buyer acknowledges that any approvals and/or listings specified in RKMC's proposal (if applicable) are limited to the specific scope and application set forth in the proposal, and may not cover or apply to any custom or special equipment or services which are outside the scope of RKMC's proposal. RKMC shall retain all proprietary rights in any and all technical data, designs or other information developed by RKMC (and not provided by Buyer) in the course of designing, developing and/or manufacturing custom equipment or systems. Buyer (and not RKMC) will be responsible for any plans, designs, specifications or shop or other drawings furnished by Buyer or for any errors or defects on account thereof or resulting therefrom. If custom equipment or systems have been ordered by Buyer, then no changes will be made or allowed once fabrication has commenced unless RKMC agrees to same in writing and the parties agree to an appropriate purchase price and lead time adjustment. If RKMC's proposal includes project work to be done at Buyer's jobsite, then (i) all scrap or excess materials are the property of RKMC and shall be removed from the premises by RKMC upon the completion of the work and (ii) notwithstanding anything to the contrary herein, the title and right of possession to modules, skids, equipment, machinery, controls, pipes, valves, fittings and/or electrical equipment, devices or appliances herein sold (and all replacement or substitutions) shall remain with RKMC and the same shall remain the personal property of RKMC irrespective of attachment to or location on any foundation or in any structure, until Buyer has made all required payments to RKMC (including deferred payments and any notes, renewals thereof and payment in full of judgments thereon).

**10. SECURITY INTERESTS:** Buyer hereby grants to RKMC a security interest in any Goods provided by RKMC and all attachments, replacements and proceeds thereof, to secure Buyer's performance hereunder and payment of the purchase price, interest on any past-due amounts as set forth in Section 2 and the costs of collection, including reasonable attorney's fees. RKMC shall have, upon default in payment or performance or upon the bankruptcy or insolvency of Buyer, all the rights and remedies of a secured creditor under the Uniform Commercial Code, including the right to immediate possession of the Goods, including, if necessary the right, at RKMC's option, to enter, without demand or notes and without legal process and with no liability whatever, the premises where such Goods may be located and to take possession and hold and dispose of the Goods in accordance with applicable law at a public or private sale. Upon any such sale, the proceeds after deducting the reasonable expense of such repossession and sale, including attorney's fees, shall be applied by RKMC in reduction of the purchase price, it being understood and agreed that RKMC will return any and all surplus to Buyer, but Buyer shall be liable to RKMC for the deficiency as liquidated damages. Such rights and remedies shall be in addition to any other rights and remedies hereunder. Buyer agrees to execute and deliver upon RKMC's request any documents necessary to perfect RKMC's security interest, and it is understood that all Goods - to the fullest extent allowed by applicable law - shall remain personal property regardless of the manner in which it may be affixed to real estate.

**11. BREACH:** In addition to any failure to comply with any other terms as set forth herein, the occurrence of any of the following events shall constitute a breach on the part of Buyer: (a) Buyer becomes insolvent or makes a general assignment for the benefit of creditors; or (b) A petition under the Bankruptcy Act is filed by or against Buyer, or (c) At any time Buyer fails to fulfill its obligations under the terms and conditions hereof, or acts in such a manner as to endanger performance of such obligations; (d) Buyer fails to ensure the Goods are maintained and operated in strict accordance with the manufacturer's written instructions; or (e) RKMC shall reasonably believe that Buyer will not timely fulfill its obligations or otherwise perform hereunder, and Buyer is unable to provide reasonable assurances that such timely performance will occur. Upon breach by Buyer, RKMC may terminate Buyer's order by giving notice to the Buyer. Such termination shall be effective immediately.

**12. INDEMNIFICATION:** Buyer shall defend, indemnify and hold RKMC, and RKMC's officers, directors and employees, harmless from and against any third-party claims, damages or losses, including reasonable attorney's fees and costs (whether based on negligence, contract or any other legal theory), to the extent such claims, damages or losses are attributable to the negligence of Buyer or Buyer's failure to perform in accordance with these terms and conditions.

**13. CONFIDENTIAL & PROPRIETARY INFORMATION:** Buyer acknowledges that the information and processes utilized by RKMC in the manufacture, supply and service of its products and systems are confidential and proprietary to RKMC. Buyer agrees to treat as confidential and proprietary any such information or processes, including, but not limited to, design information or data, proposals, software, schematics, drawings, operational and maintenance manuals, testing procedures or other similar technical information ("Confidential Information") provided by RKMC in connection with the supply or installation of products or systems hereunder, and will, at a minimum, protect any such Confidential Information in a manner commensurate with the measures taken to protect Buyer's own confidential or proprietary information. RKMC retains all rights, title and interest in all such Confidential Information, and Buyer shall not use or otherwise disclose to any third party any such Confidential Information except to the extent authorized by RKMC in accordance with these terms and conditions.

**14. INTELLECTUAL PROPERTY RIGHTS:** RKMC retains any and all intellectual property rights in and to the equipment, services and/or information supplied hereunder (including, but not limited to, patents, copyrights, trademarks and trade secrets) ("Intellectual Property"). Buyer is not granted any interest, right or license with respect to any such Intellectual Property, except to use the equipment, services and/or information for the purposes for which it is specially provided to Buyer in accordance with these terms and conditions.

**15. ACCESSORY AND SAFETY DEVICES:** Only accessory and safety devices specified in RKMC's proposal (if applicable) will be furnished by RKMC. It is the responsibility of the Buyer to furnish such accessory and safety devices as may be desired by it and/or required by OSHA standards or other law respecting Buyer's use of any equipment. Buyer shall properly operate all equipment in accordance with all code requirements and all other applicable laws, rules, regulations and ordinances.

**16. INSURANCE:** Each party shall provide and maintain at its own expense, such policies of insurance in such amounts as are appropriate and commercially reasonable for parties engaging in the type of activities contemplated by the project entered into hereunder. Upon request, each party shall furnish the other with certificates evidencing the required insurance coverage.

**17. COMPLIANCE WITH LAWS:** Buyer shall comply with all applicable federal, state, and local laws

and all rules and regulations issued thereunder. Any provisions required to be included by any such law, rule or regulation shall be deemed to be included by reference herein. Buyer shall maintain in effect all the licenses, permissions, authorizations, consents and permits that it needs to carry out its obligations hereunder.

**18. ASSIGNMENT:** The rights and responsibilities of Buyer as set forth herein, are personal to Buyer and may not be assigned or delegated without the prior written consent of RKMC.

**19. NON-WAIVERS:** RKMC's failure to demand strict performance or to otherwise enforce any rights hereunder shall not constitute a waiver of any rights hereunder.

**20. CANCELLATION/SUSPENSION BY BUYER:** No order is subject to cancellation or change by Buyer in any respect without RKMC's express prior written consent. In the event Buyer defaults or refuses to accept delivery of any Goods, RKMC shall be entitled, in addition to any of its other rights under these terms and conditions or as provided by law, to recover from Buyer an amount equal to all of RKMC's damages (including reasonable overhead charges) for such non-acceptance, default or repudiation, and RKMC shall have the right to retain, in partial or complete payment of such amount, the total of all payments made hereunder less only that portion, if any, in excess of such amount. If any project or order for which RKMC is to supply Goods hereunder is suspended by Buyer, for any reason other than a breach by RKMC, RKMC shall cooperate with Buyer in rescheduling any planned or ongoing work, and in otherwise complying with the suspension instructions. However, in the event any such suspension continues for a period of thirty (30) days, RKMC shall be entitled to terminate that order, without any further liability or obligation thereunder for RKMC, and RKMC shall be entitled to prompt compensation from Buyer in accordance with the Cancellation provision (Section 21) below.

**21. CANCELLATION CHARGES:** If Buyer's order for non-custom goods and/or services is cancelled by Buyer in accordance with these terms and conditions, RKMC shall be entitled to charge 25% of the selling price to Buyer. For any specially-designed, non-standard equipment ordered by Buyer, a 25% charge will be charged to and owed by Buyer if such order is canceled prior to RKMC incurring any related engineering, drafting or production time; provided, however, if any engineering, drafting or production time has been incurred by RKMC prior to the order being cancelled, then 100% of the selling price plus additional costs incurred will be charged to and owed by Buyer. Additional costs incurred as a direct result of cancellation, may include, but are not limited to, freight and storage charges, costs of labor, transportation, and accommodations for any required on-site technicians. Buyer will have no right to access RKMC's cost or pricing data or other books and records.

**22. APPLICABLE LAW / DISPUTES:** It is the expectation of the parties that any disputes arising hereunder will be amicably resolved by mutual agreement of the parties. Any dispute, which cannot be amicably resolved by the parties, shall be submitted to binding arbitration before the Judicial Arbitrator Group ("JAG"). The Colorado Rules of Civil Procedure shall be applied in such arbitration. THE PARTIES CONSENT AND STIPULATE THAT THE EXCLUSIVE VENUE OF ANY ARBITRATION PROCEEDING AND OF ANY OTHER PROCEEDING, INCLUDING ANY COURT PROCEEDING, UNDER THIS AGREEMENT SHALL BE WITHIN THE CITY AND COUNTY OF DENVER, COLORADO, U.S.A. (the "Agreed Venue"). For this purpose, the Parties also expressly consent to personal jurisdiction in the Agreed Venue and expressly waive any right to contest such venue under a theory of forum non conveniens or for any reason whatsoever.

**23. FORCE MAJEURE:** Neither party shall be liable for any failure or delay in its performance resulting from any cause beyond its reasonable control including, but not limited to, acts of God; acts or omissions of governments or civil or military authorities; fires; floods; hurricanes, tornadoes or other unusually severe weather; strikes or other labor disputes; embargoes; wars; political strife; riots; delays in transportation; theft; sabotage; or fuel, power, material or labor shortages.

**24. RELATIONSHIP OF THE PARTIES:** The relationship between the parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties and neither party shall have authority to contract for or bind the other party in any manner whatsoever. These terms are for the sole benefit of the parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other person or entity any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of these terms.

**25. INTEGRATION / MODIFICATION:** Except as otherwise specifically set forth herein, these terms and conditions are intended by both Buyer and RKMC as the final integrated expression of their agreement with respect to any projects or orders subject hereto. No additions to or modifications of any of the terms or conditions herein shall be effective unless set forth in a writing duly executed by both parties.

**26. CONSTRUCTION:** This Agreement shall be construed and interpreted under the laws of the State of Colorado and applicable federal United States law, regardless of conflict-of-laws principles. If any portion of this Agreement is held to be illegal or otherwise unenforceable, the parties agree that the remainder of the Agreement shall still apply in full force and effect. If these terms and conditions have been provided in response to an invitation to bid or other solicitation from Buyer, and the provisions set forth herein differ in any way from the provisions (if any) of Buyer's invitation or solicitation, these terms and conditions shall constitute RKMC's counteroffer and shall not be effective as an acceptance unless Buyer assents to the provisions herein. If these terms and conditions constitute a counteroffer, acceptance hereof must be on the exact terms contained herein. Any additional conflicting or different terms proposed by Buyer (in a purchase order, acknowledgement or otherwise) shall constitute a counteroffer by Buyer, and shall not be effective unless set forth in a mutually agreed upon writing executed by both parties; in the absence of such a writing, the acceptance of Goods by Buyer from RKMC shall constitute Buyer's agreement that these terms and conditions shall control and shall supersede Buyer's terms or conditions. No course of dealing, usage of trade or course of performance will supplement any terms and conditions set forth herein.